

EX PARTE MOTION Re: United States v. Wolfe Margolies 19cr178(KMW)

19-cr-178 (KMW); related case 22-cv-3489 (KMW)

COMES NOW the Defendant, appearing pro se, and moves this Honorable Court ex parte to authorize an expert pathologist and/or toxicologist to *obtain* the Toxicology Report of the decedent whose death triggered application of Guidelines § 2D1.1(a)(2) – which underlies this ineffective assistance of counsel claim – and to *review* the Toxicology Report in conjunction with the Autopsy Report, law enforcement affidavits in Defendant's case, and any police reports surrounding the death, and to *prepare a written expert opinion* as to whether or not Defendant's sale of heroin to the decedent approximately 20 hours before his death was or was not a "but-for" cause of death, which is required under Burrage v. United States, 571 U.S. 204 (2014).

Defendant's trial counsel's representation was deficient because, *knowing the death occurred long after Defendant's conduct*, it fell below an objective standard of reasonableness to investigate causality – whether for example the Toxicology Report indicated that the decedent ingested other drugs in the 20-hour gap, such as fentanyl or alcohol or sleeping pills not supplied by Defendant, that negated "but-for" causation – so that counsel might properly and knowingly advise the Defendant whether to accept or reject the Government's plea offer that stipulated to a Guidelines enhancement from level 12 for distribution of less than 10 grams of heroin (§ 2D1.1(a)(14)) to level 38 for distribution with a resulting death (§ 2D1.1(a)(2)).

An expert opinion that evidence was insufficient to establish by a preponderance that Defendant's conduct was the proximate or "but-for" cause of the death would constitute objective evidence in support of Defendant's claim of deficient performance. It would also support Defendant's claim that counsel's deficient performance caused him prejudice, that had counsel informed him that he could plead guilty to the indictment instead of the plea offer stipulating to level 38, there is a "reasonable probability the result of the sentencing would have been different" as he would have pleaded guilty to the indictment and offered the report into evidence at any sentencing hearing to override the Government's unsubstantiated claim that the death enhancement should apply. (The Government never obtained the Toxicology Report, according to the attached Government e-mail to my appellate lawyer.) Then, the Guidelines range would have been much lower: the adjusted total offense level for the narcotics and pornography counts combined without the "death resulting" enhancement would have been level 25 and, at Criminal History Category I, the corresponding sentencing range would have been 57 to 71 months. This Court sentenced Defendant at the bottom of the sentencing range it calculated with the death enhancement (168 months), suggesting that it would have imposed a lower sentence had Defendant pled guilty to the indictment without the death enhancement and the PSR properly calculated his range as 57-71 months.

Defendant also respectfully requests that the time to file a response to the Government's July 1, 2022 answer, be extended to 60 days *after* a decision on the instant motion authorizing an expert, to allow the expert time to obtain and review documents, and write a report, upon which Defendant can rely in filing his response; or in the event the instant motion is denied, that the time to respond be extended to 30 days after Defendant receives a copy of that Court order.

WHEREFORE, Defendant moves this Honorable Court ex parte to authorize Defendant to engage an expert, whom Defendant's CJA appellate attorney has recommended from this Court's CJA expert list, to be paid through the CJA system as Defendant is indigent and previously provided a financial affidavit to that effect.



From: [Bracewell, Mollie \(USANYS\)](#)
To: [Alessandra DeBlasio](#)
Cc: [Bagliebter, Jamie \(USANYS\)](#); [Shin, Won \(USANYS\)](#); [Maurice Sercarz](#)
Subject: Re: U.S. v. Margolies, 19-cr-178 (appeal 20-60)
Date: Monday, August 17, 2020 3:03:54 PM

Hi Alessandra,

Thanks for your email, and hope you are also well. We should be able to have the discs re-burned and mailed to you. Where should we mail them? I believe the production includes the death certificate but I don't believe we ever obtained a toxicology report. I will double check and let you know.

Thanks,
Mollie

Mollie Bracewell
Assistant U.S. Attorney

On Aug 16, 2020, at 11:21 AM, Alessandra DeBlasio <ad@adeblasiolaw.com> wrote:

Dear Mollie and Jamie,

First, Mollie congratulations!, and welcome back from maternity leave, and hoping all went perfectly despite these extraordinary circumstances.

I write now, having received all of the Mag Ct and Dist Ct transcripts, to request copies of the discovery your office provided in the *Margolies* case (19-cr-178).

I am hoping that this is not too burdensome, that it doesn't require someone rummaging around your office, but is available electronically and easily forwarded to me (or mail-able by disc, and preferably to my home).

I also wonder if a toxicology report was ever generated and if your office ever obtained it? If so, I would like to see a copy of it.

Wishing you all well these days, particularly as we return back to school/work in September.

Best,
Alessandra DeBlasio
2d Cir. CJA counsel for Wolfe Margolies

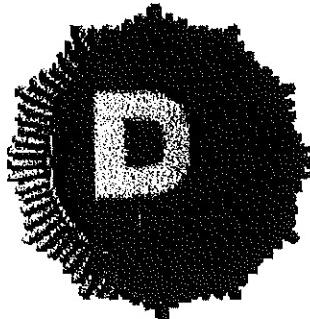
From: Bracewell, Mollie (USANYS) [<mailto:Mary.Bracewell@usdoj.gov>]

Sent: Tuesday, February 25, 2020 12:11 PM

To: Alessandra DeBlasio <ad@adeblasiolaw.com>

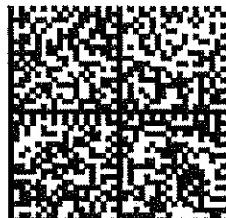
Subject: Automatic reply: Request for Statement of Reasons: U.S. v. Margolies, 19-cr-178

Thank you for your email. I'm out of the office on maternity leave until May. Please contact the other AUSA on the case, or AUSA Jamie Bagliebter at 212-637-2236.



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**Case Command :740 - NARCOTICS BOROUGH BROOKLYN
SOUTH**
Case Number :2018-0023
Tracking Number :43074651



<http://ecms.nypd.org/ecms/reports/coversheet.jsp?sysDd5Num=43074651&sysCaseNum=...> 5/10/2018

Wolfe Margolies 37756-034
FCT Danbury
Route 37
Danbury, CT 06811

WESTCHESTER NY 105
7 JUL 2022 PM 2 L

The Honorable Barbara Moses
U.S. Magistrate Judge
U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312



[legal] Mail

10007-1316SS

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FEDERAL CORRECTIONAL INSTITUTION DANBURY
33 1/2 PEMBROKE ROAD, DANBURY CT 06811

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